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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. 130

JOE C. STEPHENS et al.,
Petitioners,

vs.

ST. LOUIS UNION TRUST COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HENRY DAVIS,
1630 Boatmen's Bank Building,
St. Louis, Missouri,
Attorney for Respondent.

VAN ZANDT SMITH,
Fort Worth, Texas,
BRYAN, WILLIAMS, CAVE & McPHEETERS,
St. Louis, Missouri,
Of Counsel.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

Respondent St. Louis Union Trust Company respectfully urges that the Petition for Writ of Certiorari should not issue in this case for the following reasons:

1. The judgment of the Circuit Court of Appeals herein reversed the judgment of the District Court and remanded the case for further proceedings according to law, such judgment not being a final decision, or one upon which a Writ of Certiorari will issue.

2. The sole question involved in Petitioners' Application for Writ of Certiorari is controlled by State Law and the decision of the Circuit Court of Appeals is in conformity with that law as announced by the Supreme Court of Texas.

3. The decision of the Circuit Court of Appeals is correct not only according to the law of the State of Texas, but according to the general law, and is not contrary to long-established decisions of the Supreme Court and to **Ex Parte Phoenix Insurance Company**, 117 U. S. 367; **Wheeler v. Cloyd**, 134 U. S. 537, and **Wheless v. St. Louis**, 180 U. S. 379, as stated by Petitioners in their Application for Writ of Certiorari.

FIRST REASON.

STATEMENT, ARGUMENT AND AUTHORITIES.

Facts: The Circuit Court of Appeals reversed and remanded this case. Quoting from the opinion of that Court:

> "As stated, the plaintiff's (Respondent's) action was against all of the twenty-six Guarantors (Petitioners) in the Court below, The Young Men's Christian Association principal not being made party. Motions to dismiss for want of jurisdiction on behalf of all defendants were made based upon the proposition that none of their obligations exceeded $2,500.00, and, hence, could not be lumped together to make up the required minimum of $3,000.00. These Motions were first overruled, but later sustained by the lower court and the suit dismissed.
>
> "It is our view that this ruling was incorrect. • • • **The judgment is reversed and the cause remanded for further proceedings according to law**" (R. 35, 36).

5 Cyc. Fed. Proc. 925:

> "Rulings upon pleas or objections to the jurisdiction of the court may sustain an appeal where the decision is **against** the court's jurisdiction and the case for

that reason dismissed. But where such plea or objection is overruled the case proceeds to final judgment on the merits before an appeal can be taken on the question, and so **no appeal lies from an order of the Federal Court refusing to dismiss the case for want of jurisdiction.**" Citing Gates v. Bucki, 53 F. 961; Mann v. Gaddie, 158 F. 42.

5 Cyc. Fed. Proc. 973:

"The writ (of certiorari) cannot be issued to require the court to send up a cause over which it has no jurisdiction for determination on the merits **and will not issue to review a judgment of the Circuit Court of Appeals reversing a judgment of the lower court and remanding the cause for further proceedings, such not being a final decision,**" citing Chicago & N. W. Ry. Co. v. Osborne, 146 U. S. 354, 36 L. Ed. 1002, 13 Sup. Ct. 281; Rice v. Sanger, 144 U. S. 197, 36 L. Ed. 403, 12 Sup. Ct. 664, and Meagher v. Minnesota Thrasher Mfg. Co., 145 U. S. 608, 36 L. Ed. 834, 12 Sup. Ct. 876.

In **Chicago & N. W. Ry. Co. v. Osborne**, 146 U. S. 354, 36 L. Ed. 1002, Osborne, as plaintiff below, sued the Railway Company for damages. Judgment was rendered in his favor and the Railway Company sued out its writ of error to the Circuit Court of Appeals. That court rendered its opinion "reversing the judgment of the said United States Circuit Court for the Southern District of Iowa, and remanded the case for further proceedings in accordance with its opinion." Osborne filed his petition in the Supreme Court for Writ of Certiorari. The Supreme Court, speaking through the Chief Justice, after stating the foregoing facts, said:

"The petitions for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit are denied. McLish v. Roff, 141 U. S. 661 (35:893); Rice v. Sanger, 144 U. S. 197 (36:403); Meagher v. Minnesota T. Mfg. Co., 145 U. S. 608 (36:837)."

McLish v. Roff, 141 U. S. 661, 35 L. Ed. 893, involved an application to the Supreme Court for writ of error to a District Court to review an order of the latter court overruling a demurrer to the jurisdiction. The writ of error was taken under the Act of March 3, 1891 (26 Stat. at L. 826), Section 5 of which provides:

> "That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

Mr. Justice Lamar, speaking for the Court, said:

> "Does this provision authorize an appeal or writ of error to be taken to this court for review of a question involving the jurisdiction of the court below, whenever it arises in the progress of a case pending therein; and does the taking of such appeal or writ of error operate to stay the further proceedings in the cause until the determination by this court of the jurisdictional question? Or, in other words, has this court jurisdiction to review the question before any final judgment in the cause?
>
> "The plaintiff in error contends that we have the jurisdiction to review such question, because (1) there is in the section above quoted no express requirement of finality of judgment; and (2) because there is a positive requirement that the question of jurisdiction shall alone be certified to the Supreme Court from the court below for decision. * * *
>
> "We think that upon sound principles of construction such is not the meaning of the Act of Congress under consideration. It is manifest that the words in section 5, 'appeals or writs of error,' must be understood within the meaning of those terms as used in all prior Acts of Congress relating to the appellate powers of this court, and in the long standing rules of prac-

tice and procedure in the federal courts. Taken in that sense, those terms mean the proceedings by which a cause, in which there has been a final judgment, is removed from a court below to an appellate court for review, reversal or affirmance. * * *

"From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error (with the single exception of a provision in the Act of 1875 in relation to cases of removal, which was repealed by the Act of 1887), have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal. Forgay v. Conrad, 47 U. S. 6 How. 201, 204 (12:303, 304). The construction contended for would render the Act under consideration inconsistent with this long established object and policy. * * *

"The writ of error is dismissed."

Other potent arguments in support of the conclusion of the court are advanced in the opinion, but will not be reproduced here.

The reasoning in the McLish v. Roff case, supra, was followed in the more recent case of **Schoenamsgruber v. Hamburg American Line**, 294 U. S. 454, 79 L. Ed. 989. Mr. Justice Butler, speaking for the court, said:

"The Act of April 3, 1926, 44 Stat. at L. 233, chap. 102, U. S. C. title 28, sec. 227, added to sec. 129 a provision granting appeal 'from an interlocutory decree in admiralty determining the rights and liabilities of the parties.' This specification, taken in connection with the other parts of the section, indicates that Congress did not intend to make appealable any other interlocutory decrees in admiralty. Moreover, there is nothing to indicate that Congress intended to allow repeated appeals in the class of cases to which these belong. That would be contrary to its long-established policy. The orders under consideration may be re-

viewed on appeal from the final decree." Citing the McLish v. Roff case, supra.

Gates v. Bucki (C. C. A., 8th Cir.), 53 F. 961:

"If the bill should be dismissed for want of jurisdiction, then the appeal would be to the supreme court, and not to this court. If the plea to the jurisdiction should be overruled, then the case must proceed to a final decree on the merits before any appeal could be taken on the jurisdictional question, it being then open to the defendant Gates to go to the supreme court on the single question of jurisdiction, or to bring the entire case before this court. McLish v. Roff, 141 U. S. 661, 12 Sup. Ct. Rep. 118."

Mann v. Gaddie (C. C. A., 5th Cir.), 158 F. 42:

"A motion was made by the defendant Mann to dismiss the bill for want of jurisdiction. We find in the record, also, a plea to the jurisdiction of the court. There is no decree on either the motion or the plea. In the argument at the bar it was assumed that the court had overruled these defenses. If that were true, and it so appeared in the record, no appeal could be taken from such orders. The court having refused to dismiss the case for want of jurisdiction, the defendant objecting to the jurisdiction must wait till a final decree before he is allowed an appeal. 2 Foster's Fed. Prac. (3d Ed.), sec. 503."

Under the foregoing authorities, and particularly the reasoning set forth in the McLish v. Roff case, we submit that the Supreme Court should not issue a Writ of Certiorari in this case.

SECOND REASON.

STATEMENT, ARGUMENT AND AUTHORITIES.

Facts: Respondent sued some twenty-six defendants (Petitioners) for $39,000.00 of principal and $7,350.00 of interest upon a written contract of guaranty which provides as follows:

It recites that the Y. M. C. A. has applied to the First National Company for a loan of $100,000.00 to be evidenced by twenty-six promissory notes secured by a Deed of Trust upon certain real estate situated in Fort Worth; that

> "Whereas, said First National Company is willing to make or procure said loan upon condition that the undersigned (hereinafter sometimes called the Guarantors) execute **this guaranty in the form hereof; otherwise not**" (R. 6); * * * that
>
> "Whereas, for the purpose of consummating the said loan, the undersigned, said Guarantors, are willing, in consideration of said First National Company making or procuring said loan as aforesaid, to execute **this** guaranty in the form of this instrument.
>
> "Now, therefore, in consideration of the premises and in order to induce said First National Company to make or procure said loan for itself or for the account of its clients or future holders thereof and for other good and valuable considerations, said undersigned Guarantors, for themselves, their heirs, executors and administrators, do hereby, **jointly and severally**, guarantee unconditionally unto the St. Louis Union Trust Company, a Missouri corporation of St. Louis, Mo., as Trustee of an express trust, for the use and benefit of the holder or holders from time to time of the respective notes hereinbefore described, its successors and assigns, the payment of **all and singular** the sums due and to become due **on each and all of the said notes** above described, both principal and interest, according to their respective tenor, purport and effect: **Provided, however, that no signer of this guaranty shall be liable for a greater amount of principal or of interest than the amounts respectively set opposite his signature**, together with 8% interest per annum on so much thereof as he shall not pay when due (R. 7-8). * * *
>
> "In case default shall be made by said The Young Men's Christian Association of Fort Worth, Texas, in

> the payment of principal or interest or any part thereof, when due by lapse of time or acceleration of maturity thereof under the terms and conditions of said mortgage deed of trust or otherwise, of or on any notes aforesaid, then and thereupon **the obligation** of the Guarantors, and each of them, by reason of **this** guaranty shall immediately become effective, anything in this guaranty or in said notes and/or deed of trust to the contrary notwithstanding, and **all** principal of and accrued or earned interest on all principal and interest notes then outstanding and unpaid **shall constitute and be a direct obligation of the Guarantors and each of them,** payable upon demand therefor to said St. Louis Union Trust Company, as Trustee, its successors or assigns" (R. 8-9);

that all moneys collected by said Trustee under said guaranty should after the deduction of expenses—

> "Be applied by said Trustee toward payment of the amounts due and unpaid upon the principal and interest notes aforesaid then outstanding, respectively, ratably and without any preference or priority of any kind, according to the amounts due and payable upon such principal and interest notes at the time fixed by said Trustee for the distribution of such moneys" (R. 9);

then follows the signature of the twenty-six Petitioners herein with the sums of $1,000.00 and $1,500.00 set opposite the name of each, under respective columns entitled—

> "Respective amounts of interest guaranteed" and "Respective amounts of principal guaranteed" (R. 10).

Mr. Justice Harlan, speaking for the Court in **McDaniel v. Traylor**, 196 U. S. 415, 49 L. Ed. 533, quoted with approval the following from Walter v. Northeastern R. Co., 147 U. S. 370, 37 L. Ed. 206:

> "It is well settled in this court that * * * when two or more defendants are sued by the same plaintiff

in one suit, the test of jurisdiction is the joint or several character of the liability to the plaintiff."

1 Cyc. Fed. Proc. 963:

"The character of plaintiff's cause of action as joint, joint and several, or several, is of paramount importance on the issue of a separable controversy. In passing upon the matter the federal court will follow the state rule as to whether the cause of action is entire or not, for the question of joint or several liability of defendants is determinable by the local law." (While this statement was made in connection with a discussion of "removal of causes from state courts," nevertheless we submit that the reasoning in the instant case is the same.)

Mr. Justice Holmes, in **Chicago, R. I. & P. R. Co. v. Schwyhart**, 227 U. S. 183, 57 L. Ed. 473, in discussing the question of whether the liability of the defendants was joint or several, said:

"The joint liability of the defendants under the declaration as amended is a matter of state law, and upon that we shall not attempt to go behind the decision of the highest court of the state before which the question could come."

Chicago, R. I. & P. R. Co. v. Whitaker, 239 U. S. 421, 60 L. Ed. 360:

"The supreme court of the state decided that the petition stated a (joint) cause of action against Drake and the railway company, and whether it did, we said in Chicago, R. I. & P. R. Co. v. Schwyhart, 227 U. S. 184, 57 L. Ed. 473, 33 Sup. Ct. Rep. 250, was a matter of state law."

The two preceding quotations were quoted with approval in **Pullman Company v. Jenkins**, 305 U. S. 534, 83 L. Ed. 334.

The question of whether or not the liability of Peti-

tioners under a contract of guaranty similar to the one here involved is joint or several has been decided against Petitioners by the Supreme Court of Texas, and the law on that question is now well settled in Texas. The case of **Miller v. Bush**, 24 S. W. (2d) 23, decided by the Commission of Appeals of Texas, opinion adopted by the Supreme Court of Texas, is so similar to the instant case that we report it rather fully:

> "Waco Twine Mills, a corporation, was in financial straits, and, in order to help it out of its difficulty, the stockholders executed the following contract of guaranty:
>
> " 'The State of Texas, County of McLennan.
>
> " 'We, the undersigned stockholders of the Waco Twine Mills, in order to induce the directors of said corporation to properly finance the same by borrowing money on the credit of the Twine Mills with their endorsement, or in such other manner as to them may seem for the best interest of said mill, have agreed and here now agree that in event the directors of said corporation should by reason of such endorsement be required to pay any sum or sums of money, then we, and each of us, agree to reimburse such directors, or either of them, to the extent of the payment so made by them, or either of them, our pro rata part of such amount so paid out by the said directors.
>
> " ' **It is understood and agreed, however, that none of us shall in any event be liable in a greater sum than the amount set opposite our names,** being one-half the amount at par value of the stock now owned by us. * * *
>
> " '(Signed)
>
> | | |
> |---|---|
> | " 'J. B. Earle | 10 shares |
> | " 'T. J. Bush | 45 shares |
> | " 'C. R. Miller | 500 shares |
> | " 'G. H. Connell | 130 shares |
> | " 'J. M. Penland | 18 shares * * *.' |

etc., containing a list of all the stockholders with the number of shares of each set opposite his name.

"The directors borrowed $65,000.00 upon their personal indorsements. The corporation defaulted in the sum of $37,000.00. The directors asked the stockholders to pay their respective proportionate parts and all but six did. This was a suit filed in the District Court of McLennan County by the directors against five of the six defaulting stockholders for $22,378.00. Two of the defendants filed pleas of privilege to be sued in Dallas County, the County of their residence. Plaintiffs controverted said pleas of privilege **upon the ground that these two defendants were sued jointly on a joint and several contract,** entered into by all of the defendants, one of which defendants was a resident of McLennan County. Said two defendants contended that the liability incurred by them respectively by signing the obligation hereinbefore set out was **several, and not joint.**

"The Commission of Appeals said:

> " 'Respecting the indemnity to which the contract relates, the first paragraph of the instrument provides:
>
> " ' "We, and each of us, agree to reimburse such directors, or either of them, to the extent of the payment so made by them, or either of them, our pro rata part of such amount so paid by the said directors."
>
> " 'Liability for "our pro rata part" of the indemnity sum—that is to say, the pro rata part of every signer, including the directors—is, by appropriate language, imposed on each signer severally and on all jointly. **Nothing can be found anywhere in the instrument, or in the general nature of the transaction disclosed by its terms, which would justify the belief that the integral term, "we and each of us," as used in this clause, was intended to bear any other than its**

usual signification. On the contrary, when this entire clause is considered in the light of the language preceding it—which language discloses the occasion for the making of the contract, and the common interest of all the contracting parties in the subject matter—an intention to create a joint and several obligation on the part of the signers of the instrument, as between themselves, becomes manifest.

" 'Moreover, it occurs to us that, regardless of the particular words employed, where a binding agreement of a number of parties with one another is to the **effect** that each will bear his proportionate part of a burden resting on the shoulders of one or more of them, a joint and several obligation, as between themselves, necessarily arises. For the necessary effect of such an agreement is to bind the parties to one another for the performance of the several promises of all. * * *

" '**The contract under consideration creates a joint and several obligation. The clause next succeeding the one we have quoted does not affect the nature of this obligation. This clause has effect simply to restrict, as to amount, the liability of the several parties.**' "

Note the similarity between the contracts of guaranty in the Miller and the instant cases. To all intents and purposes we submit that they are practically identical. The contract in the Miller case provides that "We, and each of us, agree to reimburse * * *," while the contract in the instant case provides that "Said undersigned Guarantors * * * do hereby jointly and severally guarantee * * *." The clauses limiting the liability are almost identical in both contracts, the one in the Miller case reading, "None of us shall in any event be liable in a greater sum than the amount set opposite our names";

while the one in our case reads, "Provided, however, that no signer of this guaranty shall be liable for a greater amount of principal or of interest than the amounts respectively set opposite his signature." There is no difference between the Miller contract and the one in the instant case by reason of the expression "our pro rata part" in the former. See **Delaware County National Bank v. King** (Supreme Court of New York), infra.

The contract in the instant case recites the circumstances out of which it grew, showing the interest of the parties therein; it recites that:

> "Whereas, said First National Company is willing to make or procure said loan upon condition that the undersigned (hereinafter sometimes called the Guarantors) execute this guaranty in the form hereof; otherwise not; and * * *
>
> "Whereas, for the purpose of consummating the said loan, the undersigned, said Guarantors, are willing, in consideration of said First National Company making or procuring said loan as aforesaid to execute this guaranty in the form of this instrument."

It then uses this language:

> "Said undersigned Guarantors, for themselves, their heirs, executors and administrators, do hereby **jointly and severally**, guarantee * * * the payment of all and singular the sums due and to become due on each and all of the said notes above described,"

and then follows the clause limiting the liability of each Guarantor as above quoted. The contract of guaranty is referred to in the singular person as "this guaranty," and not "these several guaranties" in many places throughout. Another important clause is the one to the effect that:

> "In case default shall be made by said The Young Men's Christian Association * * * then and there-

> upon the obligation of the Guarantors, and each of them, by reason of this guaranty shall immediately become effective * * * and all principal of and accrued or earned interest on all principal and interest notes then outstanding and unpaid shall constitute and be a direct obligation of the **Guarantors and each of them.**"

We cannot understand what the parties to the contract of the guaranty in the instant case meant when they said, "Said undersigned Guarantors * * * do hereby **jointly and severally** guarantee * * *," if they did not mean what they said, i. e., that their liability under said contract was to be joint and several. As if to remove any doubt from the question, after using the clause limiting the liability of each signer to the amount set opposite his name, they followed it up with the statement that in case of default then "the obligation of the **Guarantors, and each of them,** by reason of this guaranty, shall immediately become effective."

Furthermore, Mr. Justice Day, speaking for the court in **Cincinnati, N. O. & T. P. R. Co. v. Bohon,** 200 U. S. 221, 50 L. Ed. 448, said:

> "A state has an unquestionable right by its Constitution and laws to regulate actions for negligence, and where it has provided that the plaintiff in such cases may proceed jointly or severally against those liable for the injury, and the plaintiff, in due course of law and in good faith, has filed a petition electing to sue for a joint recovery given by the laws of the state, we know of nothing in the Federal removal statute which will convert such action into a separable controversy for the purpose of removal, because of the presence of a nonresident defendant therein, properly joined in the action under the Constitution and laws of that state wherein it is conducting its operations, and is duly served with process."

Article 1986, Revised Statutes of Texas 1925, provides that:

> "The acceptor of a bill of exchange, or a principal obligor in a contract, may be sued either alone or jointly with any other party who may be liable thereon; * * *."

Under the terms of the contract of guaranty in the instant case Petitioners became liable as principals upon the default of the Y. M. C. A. (R. 8, 9). If the State of Texas has the right to enact such a statute as Article 1986, as is held in the Bohon case, supra, then Respondent in this suit has exercised its lawful privilege in joining all Petitioners in a single suit. If after having done this it may be compelled to submit to a severance and removal to the State Courts at the instance of the Petitioners, the local law as to that extent is annulled. It is clear, we submit, from the language used in the Bohon case, that the Federal Courts have no such power of annullment.

THIRD REASON.

The decision of the Circuit Court of Appeals is correct not only according to the Laws of the State of Texas, but according to the general law of the land, and is not contrary to the decisions cited by Petitioners in their brief, as stated by them, because:

(a) It is the general law of the land that the liability of guarantors under a contract of guaranty similar to the one here involved is joint and not several,

(b) Even if it be considered that the liability is several and not joint, which we say is incorrect, even then Petitioners have so tied themselves and their respective interests in the subject matter together as to make them in reality a single claim or subject matter and Respondent had the right to join all such interests or claims together

in a single suit, making their aggregate amount the value of the matter in controversy for jurisdictional purposes,

(c) Even though it be held that Respondent has twenty-six separate actions of law against the twenty-six separate Petitioners herein, which it should not be held, Respondent would have the right in equity to join together said several claims for jurisdictional purposes in order to avoid a multiplicity of suits, and

(d) There is no conflict between the decisions of the Circuit Court of Appeals in the instant case and that of the Supreme Court in the case cited by Petitioners as the ground for the issuance of the Writ of Certiorari herein.

STATEMENT, ARGUMENT AND AUTHORITIES UNDER THIRD REASON (a).

While we have been unable to find any case among the federal decisions dealing directly with the effect of a clause limiting the liability of each of a number of signers of a contract of guaranty, nevertheless we submit that the general rule as announced in the following State Court decisions is the correct one, supported by the better reasoning, and will be followed by the Federal Courts. In fact, the only case holding to the contrary which we have been able to find is that of **Thorpe v. Story**, by the California Court, 73 Pac. (2d) 1194, cited by Petitioners:

Delaware County National Bank v. King (Sup. Ct., Appellate Division), 95 N. Y. S. 956.—The Southern Textile Company gave appellant bank its note for $28,000.00. At the same time, and in order to induce the bank to accept the same and part with value therefor, appellee King and three other individuals, for a valuable consideration, executed and delivered to the bank an agreement in writing, whereby they guaranteed to the bank, each to the amount of $5,000.00, the payment of said note, with interest at

maturity. After the payment of $10,400.00, the Textile Company defaulted, and the bank sued King alone for $5,000.00. King demurred to the complaint upon the ground of defects of parties defendant, in that the other three guarantors were not made parties defendant.

The Court said:

"It seems to me that the guarantors entered into a **joint** agreement with the plaintiff, whereby they **jointly** guaranteed the payment of the note at maturity; their obligation being that, if the note was not so paid, they would be liable therefor, each to the amount of $5,000.00. If the note had been paid, with the exception of one sum of $5,000.00, a right of action would not have existed to have compelled any one of the guarantors to have paid this amount. Each would have been liable only for his proportional share thereof. **The guaranty was joint, but the amount of liability was limited. Where several persons execute an instrument upon the same consideration, at the same time, and for the same purpose, and which takes effect from a single delivery, it is a joint promise.** Promises of several persons are presumed to be joint and not several, unless a contrary intention is shown in the instrument. **I am unable to spell out any such intention from the phrase, 'each to the amount of $5,000.'** There is no difficulty with the rule of law. Parties may make a joint obligation, or a several obligation, or a joint and several obligation, as they will. It is the construction to be placed upon the peculiar words of the instrument itself which causes the difficulty. In Muzzy v. Whitney, 10 Johns 226, it was held that an obligation was joint, although one half was to be taken from one obligor's share, and the other half from the share of two other obligors; the court saying: 'This latter part of the memorandum was only a designated mode of distribution of the debt as between the defendants.' In Alpaugh v. Wood, 53 N. J. Law 638, 23 Atl. 261, the Court of Error and Appeals of New Jersey said:

"'**The inference of a joint obligation is not defeated by the fact that it appears, either in the terms of the contract or from the circumstances of the transaction, that each promisor is to contribute separately to the entire result for which they bargain.**'"

Another and more recent New York case is that of **Marine Trust Co. of Buffalo v. Richardson,** 12 N. Y. Supp. (2d) 834 (decided June 13, 1939). The contention of the appellant Trust Company was that the Trial Court should have dismissed the complaint upon the ground that the following instrument upon which suit was brought against it alone as one of the numerous obligors, established a **joint** liability upon the part of all of the obligors and not a **several** liability. The instrument was as follows:

"To the Bank of East Aurora:

"We request that you loan from time to time to the Mead School * * * such sums as may be necessary for the erection of a school in the Village of East Aurora and for value received, we for ourselves and our heirs, executors and administrators, do hereby guarantee and become responsible for the payment of all such sums due on such paper, either to you or to your assigns.

"And we do for ourselves and for our heirs, executors and administrators, expressly promise and agree upon the default of the said Mead School, that we will pay all such sums provided that our total liability shall not at any time exceed the sum of four thousand ($4,000.00) dollars and **provided that our individual liability shall in no case exceed the sum of two hundred ($200.00) dollars.** * * *"

The Court said:

"How there are to be determined the questions as to whether there is a joint or a several obligation or a joint and several obligation is well stated in sec. 112 of the Restatement of the Law of Contracts, American

Law Institute, which section sets forth the rule as follows: 'Section 112. Except as qualified by sections 115, 116, where two or more parties to a contract promise the same performance to the same promisee they incur only a joint duty unless the contrary is stated, or unless the terms of the promise or the extrinsic circumstances indicate an intention on their part to be bound severally, or jointly and severally.'

"Sections 115 and 116 of such restatement as referred to in sec. 112 above quoted, have reference to expressions of intent in the use of the first person singular (sec. 115) and sec. 116 applies to negotiable instruments. This court has examined the instrument which is the subject of the suit with the above restatement of the law in mind. The plaintiff-respondent claims that the instrument itself shows that the defendant-appellant and his co-obligor indicated intention to be bound jointly and severally. Such contention of the plaintiff-respondent is based on the following stated quotations from the instrument: 'Our individual liability shall in no case exceed the sum of $200.00' and 'or in any manner affect the liability of us or either of us. * * *' With this contention this court cannot agree with the plaintiff-respondent because **the court is of the opinion that the object of such language was to limit the maximum amount of the share of the total obligation which each obligor was to bear, and the words were not indicative of an intention to sever the total obligation into definite amounts to be borne by each obligor.** Delaware County National Bank v. King, 109 App. Div. 553, 95 N. Y. S. 956; Sisto v. Bambara, 228 App. Div. 456, 240 N. Y. S. 121. See also section 112, Restatement of the Law of Contracts, American Law Institute. * * *

"The sole intention, in so far as the burden of the obligations was concerned in the making of the instrument above quoted, was that the obligation was to be joint on the obligors, and the limitation of $200.00 was simply the maximum to which an individ-

ual obligor would be liable on the enforcement of the joint obligation as against all liable thereon."

Other cases directly in point and containing similar holdings are **Byington v. Little Rock Chamber of Commerce** (Sup. Ct. of Arkansas), 201 S. W. 122; **Taylor v. Everett** (Sup. Ct. of N. C.), 124 S. E. 316; **Southern United Ice Co. v. Rapides Groc. Co.** (Ct. of App.-Louisiana), 187 S. 313.

On page 42 of his Petition for Writ of Certiorari counsel admits that Petitioner "**could be** held jointly and severally liable for $1,500.00 principal and $1,000.00 interest, but for no more," but says that this would not be sufficient to confer jurisdiction upon the Federal District Court. We submit that this contention is completely answered by the Texas Commission of Appeals in the case of **Miller v. Bush**, supra, by the New York Supreme Court, Appellate Division, in the case of **Delaware County National Bank v. King**, supra, and by the New York Supreme Court in the case of **Marine Trust Company of Buffalo v. Richardson**, supra, where they said:

"The contract under consideration creates a joint and several obligation. The clause next succeeding the one we have quoted (i. e., the clause limiting the liability of each guarantor) does not affect the nature of this obligation. This clause has effect simply to restrict, as to amount, the liability of the several parties." **Miller v. Bush**, supra.

"The guaranty was joint, but the amount of liability was limited." **Delaware County National Bank v. King**, supra.

"The court is of the opinion that the object of such language was to limit the maximum amount of the share of the total obligation which each obligor was to bear, and the words were not indicative of an intention to sever the total obligation into definite amounts to be borne by each obligor." **Marine Trust Company of Buffalo v. Richardson**, supra.

Mr. Justice Day, speaking for the Court in the case of **Alabama G. S. R. Co. v. Thompson,** 200 U. S. 206, 50 L. Ed. 441, said:

"In the case of Powers v. Chesapeake & O. R. Co., 169 U. S. 92, 42 L. Ed. 673, 18 Sup. Ct. Rep. 264, 265, suit was brought against a railroad company and several of its servants for an injury alleged to have been caused by the joint negligence of all. Mr. Justice Gray, delivering the opinion of the court, said:

" 'It is well settled that an action of tort, which might have been brought against many persons or against any one or more of them, and which is brought in a state court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the circuit court of the United States, even if they file separate answers and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said, **"a defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings."** ' (Citing many authorities.) • • •

"As shown in the opinion of the Chief Justice in the Dixon case (179 U. S. 131, 45 L. Ed. 121, 21 Sup. Ct. Rep. 67), the cases are in difference as to whether a common-law action can be sustained against master and servant jointly because of the responsibility of the master for the acts of the servant in prosecuting the master's business. In good faith, so far as appears in the record, the plaintiff sought the determination of his rights in the state court by the filing of a declaration in which he alleged a joint cause of action.

"Does this become a separable controversy within the meaning of the act of Congress because the plaintiff has misconceived his cause of action, and had no right to prosecute the defendants jointly? We think, in the light of the adjudications above cited from this court, it does not."

Mr. Justice Hodges, speaking for a Texas Court of Civil Appeals in the case of **Parlin & Orendorff Imp. Co. v. Frey**, 200 S. W. 1143, in which writ of error was refused, referring to the Alabama G. S. R. Co. v. Thompson case, supra, said:

"It is true that in both of the above cases the suits were founded upon torts; but the ruling principle governing the right of removal is not different from that which should be applied in suits founded upon contract."

If there be any doubt as to whether the liability under the contract of guaranty in question is joint and several, or several only, which doubt Respondent denies, then such doubt should be resolved in favor of the joint and several liability. The Circuit Court of Appeals for the Fifth Circuit in the case of **Brill v. Jewett**, 262 F. 935, said:

"The presumption of law is that when two or more in writing incur an obligation the undertaking is joint, and not several, unless the language used discloses a different intention."

To the same effect is **In Re: John B. Rose Co.**, 275 F. 409, by the Second Circuit Court of Appeals. Citing numerous authorities.

STATEMENT, ARGUMENT AND AUTHORITIES UNDER THIRD REASON (b) AND (c)

Inasmuch as the reasons and authorities under Paragraphs (b) and (c) hereunder are so closely associated, we will discuss them together.

It has long been the well-established rule in the Federal Courts that where the defendants have so tied themselves and their respective claims together as to make them in reality one claim, a plaintiff may join such claims in a single suit and the aggregate amount thereof will determine the value of the matter in controversy for jurisdictional purposes. In the instant case Petitioners have clearly so tied themselves together in the execution of the aforesaid contract of guaranty as to bring themselves within the above rule.

As above stated, the reason advanced in Paragraph (b) for the refusal of a Writ of Certiorari is predicated upon the assumption, for the sake of argument alone, that the liability of Petitioners under the foregoing contract of guaranty is several and not joint. Petitioners in their brief state that there are only three exceptions to the general rule against the joinder in a single suit of causes of action against several defendants not jointly liable, and those exceptions are (1) cases where the causes of action are tied together by a fraudulent conspiracy; (2) suits in equity to avoid a multiplicity of suits; and (3) creditors' bills. We submit that the true test of the exception to the general rule is whether or not the various claims have been so **tied together as to amount in reality to a single claim,** rather than the nature of the cause of action alleged. If Petitioners' contention were correct, the rule would put a premium upon, and give a peculiar advantage to cases of, fraud. The following cases, we submit, show that the rule is not limited to cases of fraud, but covers any kind of case where the transaction and the various claims are so closely tied together as to make them in reality one:

1 Cyc. Fed. Proc. 330 states the rule as follows:

> "There are some controversies which are single in nature though involving a diversity of claims and

claimants, such, for example, as Mechanics' lien suits, the aggregate of which brought into one suit make one controversial amount. On the other hand **one contract** or **transaction** or **right** may generate diverse and independent claims **capable of being united into one controversy in a single suit.**"

Sovereign Camp, Woodmen of the World v. O'Neill et al., 266 U. S. 292, 69 L. Ed. 293, although involving a case of conspiracy, states the rule very clearly, and from the reasoning therein contained it can be seen that said rule is not limited in its application to cases of conspiracy or fraud. The facts in that case were these: 25 members of the Sovereign Camp filed 25 separate suits against said Camp in the State Courts to recover sums ranging from $987.00 to $1,170.00, which they **severally** claimed as per diem and mileage allowances and traveling expenses. The Camp went into the Federal District Court at Dallas with a suit against all 25 of said members, alleging that the latter had entered into an agreement and conspiracy to embarrass and attempt to ruin the Camp, and in pursuance thereof, had brought the said 25 separate suits. The Camp asked that the defendants be enjoined from prosecuting their separate suits in the State Courts. Justice Sanford, speaking for the United States Supreme Court, and in reviewing the case of **McDaniel v. Traylor**, 196 U. S. 415, 49 L. Ed. 533, wherein the heirs of one Evans brought suit to enjoin the several defendants from enforcing their claims against the estate where each claim was less than the requisite jurisdictional amount, but their aggregate exceeded that sum, based upon the allegation that the claims were not real debts but the result of a conspiracy to defraud the heirs, said:

> "**By reason of that combination,** resulting in the allowance of all those claims in the probate court, as expenses of administering the estate of Hiram Evans, **the defendants have so tied their respective claims to-**

gether as to make them, so far as the plaintiffs and the relief sought by them are concerned, one claim. The validity of all the claims depends upon the same facts. The lien on the lands which is asserted by each defendant has its origin as well in the combination to which all were parties as in the orders of the probate court, which, in furtherance of that combination, were procured by their joint action";

and quoting from the opinion in the same case (**McDaniel v. Traylor**) on a second appeal, 212 U. S. 428, 53 L. Ed. 584, said:

> "By reason of that combination we decided the claims were **'so tied' together** as to make them, 'so far as the plaintiffs and the relief sought by them are concerned, one claim.' "

Justice Sanford then concluded:

> "We find that, under the allegations of the present bill, the case comes fairly within the reason of the exception recognized in the McDaniel Cases. It is not only alleged that the defendants' claims are without foundation, but that they originated and are being prosecuted in the state court in pursuance of an agreement and conspiracy to embarrass and attempt to ruin the society. There is no dispute as to the amount of any particular claim; and the validity of **all** of them depends upon the **same issue.** A conspiracy to prosecute, by concert of action, numerous baseless claims against the same person for the wrongful purpose of harassing and ruining him, partakes of the nature of a fraudulent conspiracy; and in a suit to enjoin them from being separately prosecuted, it must likewise be deemed **to tie together such several claims as one claim for jurisdictional purposes, making their aggregate amount the value of the matter in controversy.** We conclude, therefore, that, on the face of the bill, the district court had jurisdiction of the suit by reason of the diversity of citizenship and the amount in controversy." (Emphasis our own.)

While the O'Neill case, supra, involved a case of conspiracy, it will be noted that the reasoning on which the decision of the Court was based is in no wise limited to such cases.

In **American Central Ins. Co. v. Harmon Knitting Mills,** 39 Fed. (2d) 21, the United States Circuit Court of Appeals for the 7th Circuit, had before it a bill in equity brought by the insured against seven companies upon seven different policies of insurance, each of which policies provided that there should be no liability for any greater proportion of the loss than the amount the policy bore to the entire insurance. (This is identical with our case for, under the Delaware County National Bank v. King case, reported on page 16, supra, the effect of the contract of guaranty in our case was that each guarantor became liable for his proportionate part of the total loss, provided said proportionate part did not exceed the sum of $2,500.00.) The Court approved the jurisdiction, saying:

> "If equity has jurisdiction of this cause, it is because it will avoid numerous actions at law. But something more is required than the avoidance of a multiplicity of suits. There must be a common interest existing among the individual defendants and between them and the plaintiff in order that a court of equity may interfere. * * * This common interest exists in the present suit, if at all, because of the similar provisions in all of the insurance policies and particularly because of that provision heretofore quoted which makes each appellant liable for only its proportion of the total loss. Is this common interest of such a nature, extent, and object, as to justify the assumption of jurisdiction by a court of equity? We think it is. Milwaukee Mechanics' Ins. Co. v. Ciaccio (C. C. A.), 38 Fed. (2d) 153. **All the defendants were interested in the loss, the determination of which constituted what might be called the gist of this suit.** It is true, each cause of action is based upon a con-

> tract, but liability is measured by the **insured's loss** rather than by the amount of the policy. In fact, liability under the contract is dependent upon the amount of **all the outstanding insurance** as well as the amount of the loss. How is the amount of outstanding insurance to be determined? And how can one company's proportion be ascertained without first ascertaining the total amount of insurance." (Emphasis our own.)

This case is even stronger than our own. In it each of the defendants had a separate contract of insurance, while in ours all of the defendants joined in a single contract. In our case, just as in the American Central Insurance Co. case, supra, all of the defendants had a common interest, first in obtaining the loan for the Y. M. C. A., and, second, the amount of the loss to the bank, if any. As said in the American Central Insurance Co. case "How can one company's proportion be ascertained without first ascertaining the total amount of insurance?"

A similar case is that of **Jamerson v. Alliance Ins. Co. et al.**, 87 Fed. (2d) 253, cert. denied 300 U. S. 683, 81 L. Ed. 886. This was a suit brought in the Federal Court by ten different insurance companies to enjoin Jamerson from prosecuting as many separate suits against them in the State Courts upon ten different policies of insurance upon the same stock of merchandise. The Companies alleged that each policy contained a provision that the insurer was not liable for more than its pro rata share of the total loss, and that none of the companies was liable on any of the policies because the defendant had fraudulently conspired with others to procure said policies, and had conspired to bring about the fire which destroyed the insured property. Jamerson pleaded want of jurisdiction, and the Court said:

> "The bill alleged equity jurisdiction first, because of the language of the policies which required an ac-

> counting with respect to the total liability and the prorated liability, and second, because the equity proceeding would avoid a multiplicity of suits. * * * We conceive of no reason why separate defendants in separate actions at law may not join their several claims for jurisdictional purposes, when, as here, their claims are identical and are the result of an unlawful and fraudulent conspiracy entered into by appellant and his co-conspirator against all of appellees."

It will be noted that we have present in our case both of the equitable grounds upon which jurisdiction was rested in the above case, namely, the proration of the liability of the Guarantors and second, the avoidance of a multiplicity of suits. In deciding the Jamerson case, supra, the Circuit Court of Appeals spoke of the fact that the opinion by the Trial Court was very well considered and adopted his reasoning. The Trial Court in his opinion quoted as follows from **Weininger v. Metropolitan Fire Ins. Co.**, 359 Ill. 584, 195 N. E. 420, 98 A. L. R. 169:

> "In the case at bar we have the **common right** in the complainants against the defendants, the establishment of which would regularly require the bringing of at least sixteen separate law actions. No defendant here has a defense which is personal to it, alone, but the defenses are common to all the defendants. If liable, each is liable for the payment of loss under the same conditions as the others. The record contains over 5,200 pages. While the cost of litigation is not the only criterion, yet in determining whether the defendants are subjected to any hardship by having the issues here tried in equity, the question of expense to the litigants and the time of the court in settling the issues are factors that may properly be considered by the court."

A leading authority and a case often cited is that of **Troy Bank v. G. A. Whitehead & Co.**, 222 U. S. 39, 32 S. Ct. 9, 56 L. Ed. 81. Upon a sale of land situated in Kentucky,

the Vendor reserved a Vendor's lien for the unpaid portion of the purchase price, for which he took two promissory notes of $1,200.00 each, payable in one and two years. Thereafter, he assigned the notes to two different people. By the law of Kentucky, the Vendor's lien passed to the assignees as a common security for the payment of both notes, without any priority of right in either assignee. The assignees jointly brought this suit in the Federal Court upon said notes and to enforce their Vendor's lien. The sole question for determination was whether the sum in dispute met the jurisdictional requirements of the Federal Court. Mr. Justice Van Devanter, speaking for the Court, said:

> "When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; **but when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount.** (Citing numerous authorities.)
>
> "The present suit is of the latter class. Its controlling object—that which makes it cognizable in equity—is the enforcement of the vendor's lien, which is a single thing or entity in which the plaintiffs have a common and undivided interest, and which neither can enforce in the absence of the other. **Thus, while their claims under the notes were separate and distinct, their claim under the Vendor's lien was single and undivided, and the lien was sought to be enforced as a common security for the payment of both notes.**"

Here the tying link between the two defendants was the Vendor's lien, just as in our case the contract of guaranty was as between the 26 defendants.

Brusselback v. Arnovitz et al., 87 Fed. (2d) 761, is a

case against certain stockholders of a bank to enforce their individual liability thereon under the Statute, to wit, 12 U. S. C. A., par. 812, which reads as follows:

> "Shareholders of every joint-stock land bank organized under this chapter shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such bank to the extent of the amount of stock owned by them at the par value thereof, in addition to the amount paid in and represented by their shares"; (This Statute it will be noted imposes the same liability upon the stockholders as the contract of guaranty does upon the Guarantors in our case.)

The various defendants moved to dismiss the Bill, and the Court sustained their Motions. The gravamen of the court's action was that the bill was not sustainable for lack (1) of jurisdiction in equity and (2) of the requisite statutory amount involved. The Circuit Court of Appeals said:

> "We think otherwise * * *. The alleged liability of defendants arose out of title 12, U. S. C. A., par. 812. It is an obligation to be borne equally and ratably by all defendants. When enforced, its proceeds go into a common fund which when made ready for distribution should be shared equally and ratably by all creditors. * * *
>
> "Appellees contend that the jurisdictional amount is fixed by the separate liability of each defendant which they construe to be less than $3,000, but such is not the test by which jurisdiction is determined. The amount in controversy is the **value of the fund to be collected** and distributed. See Brusselback v. Cago Corporation, supra, 85 F. (2d) 20, at page 23; Brusselback v. Chicago Joint Land Bank, 85 F. (2d) 617, 619 (C. C. A. 7)."

On a former appeal of the same case, 85 Fed. (2d) 20,

in which the Supreme Court denied a writ of error, 299 U. S. 586, 81 L. Ed. 432, the Circuit Court of Appeals said:

> "The contention of some of the appellees that since the amount claimed against them is less than $3,000, the court is without jurisdiction, is erroneous. The court has jurisdiction over the fund sought to be collected here and such jurisdiction necessarily carried with it jurisdiction over all component parts of the fund. Hence the fact that liability of certain stockholders may be less than $3,000 does not deprive the court of jurisdiction as to them. Robertson v. Conway, 188 F. 579 (C. C. A. 6); Conway v. Owensboro Savings Bank & Trust Co., 185 F. 950 (C. C. W. D. Ky.); Reconstruction Finance Corporation v. Central Republic Trust Co., 11 F. Supp. 976 (D. C. N. D. Ill. E. D.)."

Equitable Life Assur. Soc. of the U. S. v. Templeton, 19 Fed. Supp. 485, is another case very similar to our own. Appellant issued to the Southern Railway a master group policy of insurance. Numerous certificates were issued pursuant to the terms of said group policy to a large number of employees of the Railroad. Five employees filed their separate suits in the State Court of South Carolina against appellant, each claiming the amount of his certificate as damages for alleged breach of contract. Three of the certificates were for $3,000.00 each and two for $2,000.00 each. Appellant brought this suit in the Federal Court against all five employees individually and as a class representing any and all persons having or claiming any rights under said group policy, asking that said group policy and all certificates thereunder be canceled and that the defendants be enjoined from prosecuting their said separate suits. The Court said:

> "The Court unhesitatingly holds that this case concerns the group policy in question and admittedly the amount of coverage in this group policy is far in ex-

cess of that required by the statutes of the United States for the jurisdiction of this court in a case of this character."

Here the various separate certificates of the defendants all grew out of the same transaction and were tied together by the group policy issued to the Railroad. In our case the liability of each of the defendants grew out of the same transaction, was not evidenced by separate certificates but by a single instrument, to wit, the contract of guaranty, and were tied together not by a separate instrument given to some third party as was the group policy to the Railroad, but by the same identical instrument. Another point of similarity between the two cases is that the separate certificates issued to each employee in the Templeton case limited the amount of the Company's liability to that particular employee, which amount was under the jurisdictional amount of the Federal Court, just as the provision in the contract of guaranty in our case limited the liability of each of the defendants to $2,500.00. We submit that this case is strikingly similar to our own.

Overby v. Gordon, 177 U. S. 214, 44 L. Ed. 741:

"The amount of the estate which passes by a will, if that is held valid, constitutes the matter in dispute on a contest of the will, without regard to the amount of the interest of any one of the contestants, within the meaning of the act of Congress of February 9, 1893 (27 Stat. at L. 426), requiring the matter in dispute on appeal from a judgment of the court of appeals of the District of Columbia to exceed the sum of $5,000."

Weaver v. Norway Tack Co., 80 F. 700, held that where an action is brought upon a single agreement based upon the use of three distinct patents, it is unimportant for the purpose of giving jurisdiction of the suit that the sum

claimed to be due on any one of the patents does not exceed $2,000, provided that the total sum claimed upon all three patents does. The Court said:

> "The claim is not upon several contracts but a single one based upon the circumstances attending the use of the several machines."

Lake Charles Rice Milling Co. v. Pacific Rice Growers Association et al. (C. C. A. 9th), 295 Fed. 246, cert. denied 266 U. S. 602, 69 L. Ed. 462. The milling company brought this suit in equity against the Association, a corporation, and forty-nine individual growers and owners of rice for an accounting and recovery of a judgment against each of them. Its bill alleged that the Association entered into contracts with the individual rice growers, whereby the latter authorized the Association to enter into contracts with the milling company whereby the growers agreed to ship rough or paddy rice to appellant at its mill in Louisiana, which was to mill and sell the same at specified charges for appellant's services; that appellant was to advance the freight and to advance to the Association for account of the owners $5.00 per bag of paddy rice when received, and the Association was to deduct the sum of 5 cents per hundredweight to cover its own regular commission charges out of the final returns made by appellant. The bill further alleged that the appellant advanced to the Association pursuant to said agreements $5.00 per sack, amounting to $374,310.00, and paid freight charges in the sum of $52,368.02. The milling charges due appellant thereon were $44,064.45; that appellant had remitted to the Association sums aggregating $30,363.57, and still had the further sum of $7,272.26 derived from sales which it was ready to pay to those entitled thereto. The bill further alleged that there was then due and owing to appellant from the appellees the sum of $72,572.81; that appellant had been informed and be-

lieved that by reason of its aforesaid payments to the Association, some of the defendants had received a larger portion of the proceeds of sale than they were entitled to receive, and that others had received less than they were entitled to receive.

The Court said:

> "**The court below held that the rights of the appellant as against each of the appellees were wholly separate and distinct as arising under independent contracts with each, and that there was no community of interest between them.** It may be conceded that under the provisions of section 267 of the Judicial Code, enacted for the purpose of emphasizing the protection of a trial by jury guaranteed by the Seventh Amendment, and providing that no suit in equity may be maintained in any case where a plain, adequate, and complete remedy may be had at law, if the case here is one in which no equitable rights are involved and the actions against the 49 individual defendants are all distinct and involve different issues and different proofs, the ruling of the trial court was correct and the cause was properly dismissed. But we do not so regard the case. * * * Taking the averments of the bill to be true, it appears therefrom that the appellant cannot without an accounting ascertain the amount of each rice owner's share of liability for the unpaid balance which it claims. We cannot agree with the appellees' contention that whether or not the association properly accounted to its principals is a matter with which the appellant has no concern. The amount which the appellant is entitled to recover against the appellees, if any amount is still due and owing to it, depends upon the amount which each appellee has received at the hands of the association.
>
> "But even if there were no necessity for an accounting in equity, other grounds for the interposition of a court in equity sufficiently appear in the allegations

of the bill. **From the facts alleged it seems obvious that if there is a defense to the appellant's demand it must be a defense which is common to all the appellees. This is not a mere conglomeration of actions at law for the recovery of money involving different issues and different proofs.** The appellees here are not idle spectators as to every cause of action except their own. On the contrary, each of them has an immediate interest in the causes of action against his co-defendants and in the question of law and fact involved. The appellees are all residents of the rice growing area in the Northern district of California. **By joining them in a single action the interests of all parties and of the court will be subserved and multiplicity of suits will be avoided."** (Citing authorities.)

In **Wyman v. Bowman** (C. C. A.), 127 Fed. 257, a suit by the Receiver for a corporation against individual defendants to enforce their liability upon their stock subscriptions, the court said:

"This court has repeatedly held—and that holding is sustained by the great weight of authority—that a bill in equity against several defendants separately liable either at law or in equity may be maintained, in order to avoid a multiplicity of actions at law or of suits in equity, **whenever there is a common and decisive point of litigation between the complainant and the defendants,** the complainant has no remedy at law as prompt, practical, and efficient to attain the ends of justice as the suit in equity, and the convenience of the complainant in pursuing the single suit in equity is not overcome by the deeper inconvenience of such a course to the defendants. (Citing cases.) **In the suit under consideration, every point of litigation between complainant and the defendants is common to all the latter.** * * * Why does not this suit prevent a multiplicity of actions at law, and give to the complainant a more efficient and practical remedy,

without inconvenience to the defendants, than nine separate actions at law could give? The remedy at law which will preclude the maintenance of a suit in equity must be 'plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.' (Citing cases.)

"**Would nine actions at law, in which the same questions of law and fact would be tried nine times upon the production and reproduction of the same evidence before nine different juries, be as efficient and prompt or as practical a means to determine the questions here at issue, and to attain the ends of justice, as this single suit in equity?** The question is its own answer. Is there any deeper inconvenience to the defendants than would be compensated for by the convenience of the plaintiff in pursuing this remedy? None is proved; none can be conceived. **Indeed, the single suit in equity entails less expense, less labor, and less trouble upon the defendants by as much as it is less expensive and troublesome to try a single suit in equity than it is to try nine actions at law, involving the same controversies, conditioned by the same evidence. The defendants have a common interest in every material question of law or of fact involved in the controversy in this suit.** The remedy of the complainant by this proceeding in equity is far more efficient, prompt, and practical to attain the ends of justice, and much less expensive and inconvenient to all the parties to the controversies, than nine actions at law would be."

Judge Atwell in his opinion in this case in the Trial Court said:

> "The obligation, the responsibility, and the defenses are identical as to each defendant" (R. 17).

The Trial Court also said in his opinion, and Petitioners have urged the point in many places in their Petition for

Certiorari, that equity will not take cognizance of this suit because Respondent has an adequate remedy at law in that it can go into the State Courts and join all of the Petitioners in a single suit. **3 Cyc. Fed. Proc. 112** answers that proposition as follows:

> "And it has been the uniform rule from the beginning that the adequate remedy at law which will prevent a Federal Court of equity from taking jurisdiction must be such remedy in the Federal Courts, not those of the States." Citing Risty v. Chicago, R. I. & P. R. Co., 270 U. S. 378, 70 L. Ed. 641, and a full half page of other authorities.

In **Osborne et al. v. Wisconsin Cent. R. Co.** (C. C.), 43 Fed. 824, 826, Justice Harlan, sitting in circuit, held that the court had jurisdiction in equity of a suit in behalf of various claimants of land. The several tracts had been entered at different dates by different persons, but the titles depended upon the **same questions in law and fact.** Plaintiffs sought to restrain a railroad company from prosecuting suits against the plaintiffs. Justice Harlan said:

> "The Company's claim is good or bad against all the plaintiffs, as it may be good or bad against any one of them; and yet a judgment in favor of one, in an action of ejectment brought by the company, would not avail the others in separate actions of ejectment against them. The cause is peculiarly one in which the jurisdiction of a court of equity may be invoked in order to avoid a multiplicity of suits. **It belongs to the class 'where a number of persons have separate and individual claims and rights of action against the same party, but all arise from some common cause, are governed by the same legal rule, and involve similar facts, and the whole matter might be settled in a single suit brought by all these persons uniting as co-plaintiffs, or one of the persons suing on behalf of the others, or even by one person suing for himself alone.'** 1 Pom. Eq. Jur., sections 245, 255, 257, 268, 269, 273, and au-

thorities cited in notes to these sections. Crews v. Burcham, 1 Black 352, 357 (17 L. Ed. 91). In such cases the plaintiffs are **united** by a **common tie**, created by identity of interest in the decision of the same questions of law and of fact, and have a **common** adversary. The fact that the several tracts of land here in dispute were entered at different dates, and by different persons, is of no consequence, as the validity of each entry, as against the railroad company, depends upon precisely the same questions of law and fact."

The same rule of permitting the joinder in a single suit of causes **"tied together," or growing out of the same transaction** prevails in Texas. In **Gregg v. Texas Bank & Tr. Co.** (Civ. A.), 235 S. W. 689, error refused, the plaintiff bank sued D. A. and J. M. Gregg upon 6 notes executed by D. A. Gregg. J. M. was on one note only, as an endorser. Upon a plea of misjoinder of parties, the defendants raised the proposition that different causes of action against different defendants cannot be maintained in the same suit. The Court said:

"As an abstract proposition, that would be true, but under the facts of this case we do not believe the contention is sound. The record discloses that the notes in toto in question **grew out of** and were executed in pursuance of an agreed settlement of a land suit involving the title to a tract of land in which judgment embodying the agreement of the parties was entered, said agreement providing for the execution of all the notes, liens, deed, and deed of trust as alleged by plaintiff, and this suit is but the enforcement of the remedies there given."

Chief Justice Taney, speaking for the Court in **Shields v. Thomas**, 58 U. S. (17 How.) 3, 6, 15 L. Ed. 94, said:

"It is like a contract with several to pay a sum of money. It may be that the money when recovered is to be divided between them in equal or unequal proportions. Yet if a controversy arises on the contract,

and the sum in dispute upon it exceeds $2,000, an appeal would clearly lie to this court, although the interest of each individual was less than that sum."

Furthermore, we think that Rule 20 under the New Rules of Federal Procedure gave Respondent the right to join all of the Petitioners herein in a single suit. Said Rule, we submit, is the same as the rule of decision embodied in the foregoing cases. Rule 20 reads as follows:

"(a) **Permissive Joinder.** All persons **may** join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. **All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or, in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action.** A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities."

STATEMENT, ARGUMENT AND AUTHORITIES UNDER THIRD REASON (d).

Petitioners state that the decision in the instant case by the Circuit Court of Appeals is contrary to the decisions of the Supreme Court in the cases of:

Ex Parte Phoenix Insurance Company, 117 U. S. 367;
Wheeler v. Cloyd, 134 U. S. 537;
Wheless v. St. Louis, 180 U. S. 379, 382.

That such is not the case is clearly shown in the following quotations from said cases:

Ex Parte Phoenix Insurance Co., supra:

> "The suit was brought on a single instrument, by which, as it was adjudged, an agent of the several insurance companies named bound them **severally**, each for its proportionate share of one-fourth, to insure the property of Mrs. Helen M. Fitton for $12,000; and the decree is against each company **separately** for its separate obligation under this instrument, to wit, $3433.50 and no more. The bill alleged the **separate** liability of each company, and prayed, in substance, for decrees against them **severally** for the proportion assumed by each in the contract."

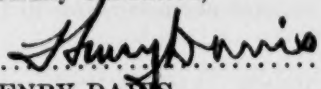
Wheeler v. Cloyd, supra:

> "It is clear that the appeal must be dismissed. The decree from which it was taken was not a **joint** decree, as is readily observed by a mere inspection of it."

The **Wheless v. St. Louis** case, supra, involved a tax assessment against various individual defendants and no claim of joint liability whatsoever is made therein.

Wherefore, premises considered, Respondent respectfully prays that the Court refuse to grant a Writ of Certiorari herein and for such orders as may be appropriate.

Respectfully submitted,



HENRY DAWS,
1630 Boatmen's Bank Building,
St. Louis, Missouri,
Attorney for Respondent.

VAN ZANDT SMITH,
Fort Worth, Texas,

BRYAN, WILLIAMS, CAVE & McPHEETERS,
St. Louis, Missouri,
Of Counsel.